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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

THE PEOPLE, Plaintiff and Respondent, v. STEVEN HOWARD MITTELMAN, Defendant and Appellant.	C069932 (Super. Ct. No. P10CRF0235)

A jury found defendant Steven Howard Mittelman guilty of the deliberate and premeditated first degree murder of his ex-wife Valerie Mittelman. (Pen. Code, § 187, subd. (a).)[1] The jury also found true allegations defendant intentionally and personally used and discharged a firearm causing great bodily injury in the commission of the murder. (§§ 12022.5, subd. (a); 12022.53, subds. (b), (c), and (d).)

[1] Further undesignated statutory references are to the Penal Code.

Sentenced to 50 years to life in state prison, defendant appeals, contending (1) there is insufficient evidence of premeditation and deliberation, (2) the prosecutor prejudicially misstated the law on the objective component of heat of passion manslaughter, and (3) the trial court erred in ordering defendant to pay $2,500 for the services of the public defender's office because the evidence was insufficient that defendant had an ability to pay.

We shall conclude that the first two contentions lack merit but agree that the trial court erred in ordering defendant to pay $2,500 for the services of the public defender's office without notice or a hearing on defendant's ability to pay as required by section 987.8, subdivision (b). Accordingly, we shall reverse the order directing defendant to pay for the services of the public defender's office and remand the matter to the trial court for notice and a hearing concerning defendant's ability to pay all or a portion of the cost of the services provided. We shall affirm the judgment in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND[2]

Defendant and Valerie Mittelman were married in 1981 and divorced in 2003. Sometime thereafter, defendant met and married Gail Mittelman.[3] In the fall of 2008, Valerie, who had fallen on hard times, moved in with defendant and Gail. Initially, they lived in a house in Antelope but eventually moved to an apartment in El Dorado Hills.

In early 2009, defendant and Gail purchased a convenience store in Placerville. Valerie worked at the store with defendant in exchange for her room and board, cigarettes, liquor, cable television, and $30 a week in spending money. In addition to defendant and Valerie, there was one other employee who helped out three hours a day.

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[2] We set forth the facts in the light most favorable to the prosecution as we must. (*People v. Felix* (2009) 172 Cal.App.4th 1618, 1624.)

[3] To avoid confusion, and intending no disrespect, we shall refer to defendant's ex-wife Valerie Mittelman and his current wife Gail Mittelman by their first names.

Initially, the store made a monthly profit of between $1,250 and $1,500. That amount later increased by between $200 and $400 a month.

At all times relevant herein, Gail worked full time as a clerk for Sutter Health.

On June 17, 2010, Gail was in San Diego for the birth of her grandchild. Defendant wanted to accompany her to San Diego, but Valerie refused to watch the store for him. That day, defendant and Valerie worked their usual shift at the store and returned to the apartment around 3:30 p.m. Once there, Valerie fixed them each a cocktail, and they sat in the living room talking. After a few cocktails, they began to argue over whether defendant should travel to Modesto to visit an old girlfriend. The conversation then turned to Gail. Valerie told defendant Gail was having an affair, Gail did not love him, and defendant would never have a role as a grandparent because Gail's daughter did not like him. Valerie also reminded defendant that she had terminated a pregnancy in 1979 and stated, "you're not cut out for [being a parent or grandparent], and that[']s] [why] I aborted your child because I didn't want you to be the father of my child."

At that point, defendant got up from his chair in the living room, walked to the dining room, retrieved a loaded gun from his briefcase on the dining room table, walked back to the living room with the gun, "lined up a shot" at Valerie's head, and pulled the trigger. Defendant did not say anything to Valerie before shooting her, and there was no struggle. Valerie never knew defendant had retrieved the gun.

At trial, defendant testified that when he retrieved the gun, he was thinking about killing himself but as he walked back toward his chair in the living room, he thought he saw Valerie smirk, as if to say, "I've just put you in your fucking place once and for all." Defendant said he "exploded," pointed the gun at Valerie's head, and fired.

I

The Jury's Finding of Premeditation and Deliberation Is Supported by Sufficient Evidence

Defendant contends that his first degree murder conviction must be reversed because the jury's finding of premeditation and deliberation is not supported by sufficient evidence. We disagree.

In reviewing a challenge to the sufficiency of the evidence, our "task is to determine whether, in light of the whole record viewed in the light most favorable to the prosecution, a rational trier of fact could have found the elements of the crime beyond a reasonable doubt." (*People v. Felix, supra*, 172 Cal.App.4th at p. 1624.) We " ' "must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" ' [Citations.]" (*People v. Smith* (2005) 37 Cal.4th 733, 739.) "The credibility of witnesses and the weight accorded the evidence are matters within the province of the trier of fact. [Citations.]" (*People v. Ramos* (2004) 121 Cal.App.4th 1194, 1207.) We " 'must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise. [Citation.]' [Citation.]" (*People v. Halvorsen* (2007) 42 Cal.4th 379, 419.) "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the jury's finding.]' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

" 'A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill. . . . "Deliberation" refers to careful weighing of considerations in forming a course of action; "premeditation" means thought over in advance. [Citations.] "The process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold,

calculated judgment may be arrived at quickly.' [Citations.]" ' [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1182.)

In *People v. Anderson* (1968) 70 Cal.2d 15, our "Supreme Court described the categories of evidence relevant to premeditation and deliberation that have been found sufficient to sustain convictions of first degree murder: '(1) facts about how and what defendant did prior to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing–what may be characterized as "planning" activity; (2) facts about the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a "motive" to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of "a pre-existing reflection" and "careful thought and weighing of considerations" rather than "mere unconsidered or rash impulse hastily executed" [citation]; (3) facts about the nature of the killing from which the jury could infer that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a "preconceived design" to take his victim's life in a particular way for a "reason" which the jury can reasonably infer from facts of type (1) or (2).' [Citation.]" (*People v. Concha* (2010) 182 Cal.App.4th 1072, 1084, italics omitted.) "This framework does not establish an exhaustive list of required evidence that excludes all other types and combinations of evidence that may support a jury's finding of premeditation [citation], nor does it require that all three elements must be present to affirm a jury's conclusion that premeditated murder was intended. [Citations.]" (*People v. Felix*, *supra*, 172 Cal.App.4th at p. 1626.)

Here, there is substantial evidence that defendant's murder of Valerie was deliberate and premeditated, rather than the result of an unconsidered or rash impulse. Defendant's surreptitiously obtaining the loaded gun from his briefcase on the dining room table is indicative of planning activity. (See *People v. Perez* (1992) 2 Cal.4th 1117, 1126; see also *People v. Wharton* (1991) 53 Cal.3d 522, 547.) Defendant had time to

reflect upon his action when he walked across the room, retrieved the loaded gun from inside his briefcase, returned, lined up the shot at Valerie's head, and pulled the trigger. Finally, the manner of killing, "a close-range gunshot to the face is arguably sufficiently 'particular and exacting' to permit an inference that defendant was acting according to a preconceived design." (*People v. Caro* (1988) 46 Cal.3d 1035, 1050.) While the evidence may not be overwhelming, we need not be convinced beyond a reasonable doubt that defendant premeditated the murder. " 'The relevant inquiry on appeal is whether " 'any rational trier of fact' " could have been so persuaded. [Citations.]' [Citation.]" (*Id.* at p. 1051) The evidence in this case meets this test.

II

The Prosecutor Did Not Misstate the Law Concerning Heat of Passion

Defendant next contends the prosecutor misstated the law during closing argument by suggesting that the jury should not consider "[defendant's] point of view nor the individual circumstances in which [defendant] found himself" in determining whether defendant "was objectively provoked into killing his ex-wife Valerie." We disagree.

During closing argument, the prosecutor stated in pertinent part:

"The second aspect of provocation that is very important is that it's objective. It's not what would provoke *this particular Defendant*, given his own personal history, his own personal mental state, the fact that he's been drinking. None of those things are relevant when you determine whether there's sufficient provocation to lessen either the degree of murder or reduce this all the way down to manslaughter.

"It's important that you understand that. You'll go back and you'll be talking about this case. And at some point one of you may say 'well, he was provoked, and he was drunk.' Time-out. The intoxication is not relevant when analyzing whether the provocation was sufficient to justify, excuse, or lessen his responsibility for what he did, because he chose to drink. He voluntarily intoxicated himself. And when you do that, you're still responsible for what you do.

"And your reactions to provocation aren't judged by your *own personal idiosyncrasies*. They're judged by this legal fiction: The average, reasonable, sober person. Not a guy with [a] bad temper, not a guy who has been drinking, but you or me. Someone who is just average." (Italics added.)

Defendant claims that while "[m]uch of what the prosecutor said . . . is legally accurate," the prosecutor "misstated the law regarding the objective component of provocation . . . when he told the jury not to consider 'this particular Defendant,' and that [defendant's] 'own personal idiosyncrasies' are not what govern." According to defendant, by doing so, the prosecutor "suggested that the defendant's own personal point of view is wholly irrelevant when determining reasonableness," and that "the jury should disregard the circumstances in which [defendant] found himself . . . ."

"A prosecutor commits misconduct when his or her conduct either infects the trial with such unfairness as to render the subsequent conviction a denial of due process, or involves deceptive or reprehensible methods employed to persuade the trier of fact." (*People v. Avila* (2009) 46 Cal.4th 680, 711.) "As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Here, because defendant did not object to the challenged statements, and because no exception excuses or justifies defendant's failure to object, the claim is forfeited. (*Ibid*.) It is also meritless.[4]

"Heat of passion is a mental state that precludes the formation of malice and reduces an unlawful killing from murder to manslaughter. Heat of passion arises if, ' "at the time of the killing, the reason of the accused was obscured or disturbed by passion to

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[4] Because we find defendant's claim is meritless we need not consider his assertion that his counsel was ineffective for failing to object to the prosecutor's statements.

such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment." ' [Citation.] Heat of passion, then, is a state of mind caused by legally sufficient provocation that causes a person to act, not out of rational thought but out of unconsidered reaction to the provocation." (*People v. Beltran* (2013) 56 Cal.4th 935, 942, fn. omitted.) "Provocation is adequate only when it would render *an ordinary person of average disposition* 'liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.' " (*Id.* at p. 957, italics added.) A defendant may not set up his own standard of conduct. (*People v. Steele* (2002) 27 Cal.4th 1230, 1254-1255 (*Steele*).) "The law does not . . . permit [a] defendant to use himself as the measure of what is adequate provocation to reduce what would otherwise be murder to manslaughter." (*Id.* at p. 1255.)

In *Steele,* the defendant argued that " 'the law of manslaughter required the jury in this case to consider how an otherwise ordinary person, having [his] Vietnam War background, his resulting clear symptoms of post-traumatic stress disorder, and his brain function abnormalities which led him to misinterpret and overreact to events, would have acted in the situation in which [he] found himself at the time of the killing." (*Steele, supra,* 27 Cal.4th at p. 1255.) In rejecting this claim, the court explained that "because only he fits this particular description, defendant would be setting his own standard of conduct, contrary to the law. Such a rule would eliminate the objective standard in favor of a subjective one. It would, in effect, resurrect the abolished defense of diminished capacity in the guise of an expanded form of heat of passion manslaughter." (*Ibid.*)

Here, consistent with *Steele,* the prosecutor told the jury that when determining the sufficiency of the provocation, it must consider whether an "average, reasonable, sober person" would have reacted from passion rather than judgment, not "this particular Defendant," the "guy with [a] bad temper," or "a guy who has been drinking . . . ." Contrary to defendant's assertion, the prosecutor did not suggest the jury should

disregard the circumstances in which defendant found himself; he told the jury not to consider defendant's mental state, namely that he was intoxicated. That is a correct statement of the law. (See *Steele, supra,* 27 Cal.4th at p. 1253 ["Defendant's evidence that he was intoxicated, that he suffered various mental deficiencies, that he had a psychological dysfunction due to traumatic experiences in the Vietnam War, and that he just 'snapped' when he heard the helicopter, may have satisfied the subjective element of heat of passion" but "does not satisfy the objective, reasonable person requirement, which requires provocation by the victim"].)

Moreover, even assuming for argument's sake that the prosecutor did misstate the law, the misstatement was not prejudicial because the trial court correctly instructed the jury on the heat of passion defense pursuant to CALCRIM No. 570.[5] "When argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former, for '[w]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.' [Citation.] We so conclude here." (*People v. Osband* (1996) 13 Cal.4th 622, 717.)

Accordingly, defendant's claim the prosecutor prejudicially misstated the law fails.

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[5] The court instructed the jury in pertinent part as follows: "It is not enough that the Defendant simply was provoked. The Defendant is not allowed to set up his own standard of conduct. You must decide whether the Defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment."

III

The Case Must Be Remanded for a Hearing on Defendant's Ability to Pay All or a Portion of the Cost of the Legal Assistance Provided

Lastly, defendant contends the trial court erred by ordering him to reimburse the public defender's office in the amount of $2,500 pursuant to section 987.8 "because the evidence was insufficient to demonstrate his ability to pay." We agree the trial court erred and shall remand the matter for a hearing on defendant's ability to pay.

Section 987.8, subdivision (b) provides in pertinent part, "In any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court, . . . the court may, *after notice and a hearing*, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof." (Italics added.)

" '[P]roceedings to assess attorney's fees against a criminal defendant involve the taking of property, and therefore require due process of law, including notice and a hearing.' [Citation.] . . . Under [section 987.8], a court may order a defendant, who has the ability to pay, to reimburse the county for the costs of legal representation. However, the defendant must be given notice and afforded specific procedural rights, including the right to present witnesses at the hearing and to confront and cross-examine adverse witnesses. [Citations.]" (*People v. Phillips* (1994) 25 Cal.App.4th 62, 72-73, fn. omitted.)

A determination that a defendant has the ability to pay is a prerequisite for entry of an order for attorney fees. (§ 987.8, subd. (e).) While such a finding may be implied, the order cannot be upheld on review unless it is supported by substantial evidence. (*People v. Nilsen* (1988) 199 Cal.App.3d 344, 347; *People v. Kozden* (1974) 36 Cal.App.3d 918, 920.) Where, as here, the defendant has been sentenced to state prison, there is a presumption the defendant does not have the ability to reimburse defense costs. (§ 987.8, subd. (g)(2)(B); see also *People v. Flores* (2003) 30 Cal.4th 1059, 1068.) "Unless the

court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense." (§ 987.8, subd. (g)(2)(B).)

Here, there is no indication in the record that defendant was provided notice that the trial court was considering ordering him to pay for the services of the public defender's office, and the trial court failed to conduct a hearing on the issue. The probation report does not recommend defendant be ordered to pay for such services; indeed, the costs of defendant's defense are not mentioned. Rather, it appears the issue was first raised at the end of defendant's sentencing hearing. When the trial court asked whether there "[i]s . . . anything else we need to address," the prosecutor responded, "The only thing I would ask the Court to address is the public defender fee." The prosecutor asserted that the trial court "has the authority and the obligation . . . to make that inquiry as to what assets he may have in order to pay for the services he's received" and noted defendant "is a local business owner" and "does not appear, superficially . . . to be indigent." The trial court responded by ordering defendant to "pay $2,500 for the services of the public defender's office."[6]

The preferred solution when a trial court fails to make a necessary finding is to remand the case for a new hearing on the matter. (*See People v. Flores, supra*, 30 Cal.4th at pp. 1068-1069; *People v. Verduzco* (2012) 210 Cal.App.4th 1406, 1421.) Since there is no indication the trial court considered defendant's ability to pay in making its order, we remand the matter for a hearing consistent with section 987.8.

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6 Where, as here, defendant's objections to the fee order go to the sufficiency of the evidence to support the order, no objection need be made in the trial court. (*People v. Viray* (2005) 134 Cal.App.4th 1186, 1217.) Thus, defendant did not forfeit his right to object to the lack of any finding concerning his ability to pay.

Further, on the merits, there is no evidence that the $2,500 defendant was ordered to pay represents the actual costs to the county of the services provided to defendant. (*See People v. Viray*, *supra*, 134 Cal.App.4th at p. 1217.) In *People v. Viray*, the court found an itemization of services from the public defender's office claiming 46 hours were expended at a rate of $200 per hour was inadequate absent "competent *evidence*–that $200 per hour represents the actual cost to the county of defendant's representation." (*Ibid.*) Here, there is no itemization or bill of any kind in the record concerning the services provided, much less the actual cost to the county for such services. "[I]n the absence of some evidence [as to the actual cost]–or at least a recital by an officer of the court–there is no basis for the award under review." (*Ibid.*)

There also is a dearth of evidence to support a finding of unusual circumstances necessary to overcome the presumption defendant lacked the ability to pay. (§ 987.8, subd. (g)(2)(B).) The Attorney General points to defendant's "equity interest in the convenience store, his increasing monthly profit from the store, and Gail's steady income from her job" as evidence of defendant's ability to pay. The Attorney General fails, however, to cite to any evidence indicating (1) the value of defendant's equity interest, if any, in the store, (2) the profitability of the store following the death and incarceration of the individuals who ran and worked at the store, or (3) Gail's income from her job as a clerk at Sutter Health. Accordingly, the "evidence" relied on by the Attorney General does not suggest a basis for a finding of unusual circumstances.

For all the foregoing reasons, we remand the matter for a determination under section 987.8 of defendant's ability to pay all or a portion of the cost of the legal assistance provided.

DISPOSITION

The order directing defendant to pay $2,500 for the service of the public defender's office is reversed and the matter is remanded to the trial court for notice and a hearing under section 987.8, subdivision (b) concerning defendant's ability to pay all or a

portion of the cost of the legal assistance provided to defendant. In all other respects, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting this modification and to forward a certified copy thereof to the Department of Corrections and Rehabilitation.

BLEASE, J.

We concur:

RAYE, P. J.

BUTZ, J.